STATE OF MICHIGAN

IN THE SUPREME COURT

INNOVATION VENTURES, LLC f/d/b/a LIVING ESSENTIALS, a Michigan Limited Liability Company,

Plaintiff-Appellant,

v

LIQUID MANUFACTURING, LLC, a Michigan Limited Liability Company, K & L DEVELOPMENT OF MICHIGAN, LLC, a Michigan Limited Liability Company, LXR BIOTECH, LLC, a Michigan Limited Liability Company, ETERNAL ENERGY, LLC, a Michigan Limited Liability Company, ANDREW KRAUSE, an individual, and PETER PAISLEY, an individual,

Defendants-Appellees.
_____/

Supreme Court No. 150591

Court of Appeals No. 315519

Oakland County Circuit Court
Case No. 12-124554-CZ

Hon. Phyllis C. McMillen

John J. Bursch (P57679)
Matthew T. Nelson (P64768)
WARNER NORCROSS & JUDD LLP
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503-2487
616.752.2000

E. Powell Miller (P39487)
Kevin F. O'Shea (P40586)
Emily H. Hughes (P68724)
THE MILLER LAW FIRM, P.C.
950 West University Drive, Suite 300
Rochester, Michigan 48307
248.841.2200

Attorneys for Plaintiff-Appellant

Thomas P. Bruetsch (P57473)
BODMAN PLC
6th Floor at Ford Field
1901 St. Antoine
Detroit, Michigan 48226
313.259.7777

Attorneys for Defendants-Appellees

Peter Paisley
Pro Se
305 Westwood Avenue
Ann Arbor, Michigan 48103

APPELLANT INNOVATION VENTURES, LLC'S BRIEF

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STATEMENT OF APPELLATE JURISDICTION

The Court has jurisdiction to hear this appeal of the Court of Appeals judgment entered on October 23, 2014, under MCR 7.301(A)(2). Innovation Ventures timely applied for leave to appeal on December 4, 2014. The Court granted leave to appeal on July 1, 2015.

The Court of Appeals had jurisdiction under MCR 7.203(A)(1) to hear and decide Innovation Ventures' appeal from the Oakland County Circuit Court's March 15, 2013 Opinion and Order granting summary disposition on all claims in favor of Defendants. Innovation Ventures timely appealed the circuit court's judgment on April 3, 2013.

STATEMENT OF QUESTIONS PRESENTED

1. Whether the doctrine of failure of consideration applies to void the Equipment Manufacturing Agreement and the Non-Disclosure Agreement because they were terminated only weeks after execution (as foreign courts have held with regard to employment non-compete provisions), even though the contracts here are commercial, memorialized the parties' ongoing oral agreements, and were terminated in accordance with their terms.

The Court of Appeals says: Yes

The circuit court did not address this issue

Appellant Innovation Ventures says: No

2. Whether the partial exclusivity provision in the Termination Agreement is an unenforceable restraint on trade even though the agreement actually promoted competition by allowing Liquid Manufacturing to use Innovation Ventures' production equipment to bottle energy shots for Innovation Ventures' competitors.

The Court of Appeals says: Yes

The circuit court says: Yes

Appellant Innovation Ventures says: No

3. Whether summary disposition is appropriate on a claim for trade-secret misappropriation before any meaningful discovery has taken place.

The Court of Appeals says: Yes

The circuit court says: Yes

Appellant Innovation Ventures says: No

INTRODUCTION

Plaintiff Innovation Ventures, LLC, is a Michigan company based in Farmington Hills, Michigan that invented and sells "5-hour ENERGY®," an energy shot that is distributed to retailers around the country. Innovation Ventures contracted with Defendant Liquid Manufacturing, LLC in 2007, through its owner and president, Defendant Peter Paisley, to produce and package 5-hour ENERGY in Brighton, Michigan. To design, manufacture, and install the bottling and packaging equipment at Defendant Liquid's plant, Innovation Ventures contracted with Defendant Andrew Krause and his company, Defendant K&L Development of Michigan, LLC. Innovation Ventures later extended its contract with Krause and K&L to manufacture and install a second production line. Based solely on the contractual relationship among the parties, Paisley, Krause, and their companies had access to every important aspect of Innovation Ventures' operations, including production, sales, and distribution information.

In 2010, Innovation Ventures was ready to in-source production. Innovation Ventures could have simply kept the Brighton production equipment that it owned for itself. But at Defendants Liquid and Paisley's request, Innovation Ventures instead allowed those Defendants to use Innovation Ventures' equipment royalty-free (and later to purchase that equipment on an installment plan) to produce certain pre-approved energy drinks (such as Red Bull) or energy shots for other companies. Liquid's use was expressly conditioned on a partial exclusivity agreement that allowed Innovation Ventures to control how its proprietary equipment was used, by pre-approving products that could be manufactured with that equipment.

Within two months of agreeing to obtain Innovation Ventures' approval before using Innovation Ventures' equipment to bottle competing products, Liquid breached the parties' agreement by producing several unapproved products. Liquid further violated the parties'

agreement by obtaining Innovation Ventures' conditional approval to bottle Eternal Energy by claiming it was being produced by a group of tattoo parlors when Liquid knew that the majority backers of Eternal Energy were Krause and Paisley. This is precisely the type of equipment misuse that Innovation Ventures contracted to avoid.

When these details came to light, Innovation Ventures obtained a TRO that ordered Defendants to stop producing Eternal Energy and gave Innovation Ventures the right to inspect Liquid's facility. A first inspection revealed that Defendants were producing energy shots with the names E6 and Quick Energy, neither of which Innovation had pre-approved as the parties' contract expressly required. A second inspection one week later revealed that Defendants were also producing Quencher and 9 Hour Empower, again all without Innovation Venture's pre-approval. And Innovation Ventures later learned of yet *another* unapproved energy shot, Krause and Paisley's Perfectly Petite.

Despite all this, the lower courts refused to enforce the parties' agreements. The Court of Appeals voided the contract between Innovation Ventures and Krause and K&L, based on an issue that no party or the trial court had ever even raised: the failure of consideration. The court adopted the requirement in some foreign jurisdictions—but never previously applied in Michigan—that for a continued business relationship to provide adequate consideration for a non-competition agreement, it must be of a "substantial duration." (Innovation Ventures terminated the parties' contract, pursuant to its terms, shortly after execution for business reasons. The record is not developed on this point because the trial court cut off discovery.) That holding conflicts with the rule that courts do not circumscribe freedom to contract by evaluating the reasonableness of consideration.

The Court of Appeals also voided Innovation Ventures' contract with Liquid by holding that the written partial exclusivity agreement was unreasonable under the rubric for analyzing a non-compete provision in an employment context. But the contract was between sophisticated businesses, not an employer and employee, and it promoted competition. The Court of Appeals' holding conflicts with the plain language of the Michigan Antitrust Reform Act and published decisions that the rule of reason applies when evaluating the validity of a contract between commercial parties. Under that rule, there is nothing unreasonable about Innovation Ventures limiting how its own equipment might be used to manufacture competitors' products. Indeed, although Innovation Ventures could have prohibited Liquid from manufacturing *any* competing products, Innovation Ventures *promoted* competition by allowing Liquid to use Innovation Ventures' equipment to produce competitors' products at all.

Finally, the Court of Appeals upheld the grant of summary disposition for Defendants on Innovation Ventures' claim for trade-secret misappropriation. The Court of Appeals so held even though summary disposition was granted before discovery closed and before Innovation Ventures had received any meaningful written discovery or conducted any depositions. This is particularly important given that Defendants had deceived Innovation Ventures, making thorough discovery critical to identify material facts typically concealed in trade-secret misappropriations cases.

The absurd result is that Krause, Paisley, and their companies were relieved of all their contractual promises to protect Innovation Ventures' trade secrets and proprietary information and were allowed to freely and directly compete with Innovation *using Innovation Ventures' own manufacturing equipment* and confidential business information. Conversely, Innovation Ventures has no ability to re-negotiate the consideration it received in exchange for allowing

what was supposed to be only carefully circumscribed use of its equipment. In other words, the Court of Appeals rewrote the parties' contracts entirely, giving Defendants the unfettered ability to produce and sell products in direct competition with Innovation Ventures based on the knowledge Defendants acquired from Innovation Ventures and using Innovation Ventures' production equipment, all at no cost to Defendants. The court deprived Innovation Ventures of the material benefits for which it expressly bargained. This Court should reverse and remand for entry of partial summary disposition in favor of Innovation Ventures.

BACKGROUND

The parties and an overview of their business relationships

Innovation Ventures, formerly doing business as Living Essentials, pioneered the energy-shot market. (Henderson Aff ¶ 15, App 228a.) It manufactures and markets an approximately two-ounce energy shot known as 5-hour ENERGY. (2d Am Verified Compl ¶ 10, App 17a; Dolmage Aff ¶ 2, App 234a.) 5-hour ENERGY is a singularly successful product, with sales of more than 700 million units between 2004 and early 2012. (2d Am Verified Compl ¶ 19, App 19a.) Innovation Ventures has spent more than $450 million on advertising, marketing, and promoting 5-hour ENERGY to establish and maintain its brand identity and product integrity. (*Id.*; Dolmage Aff ¶ 3, App 234a.) As a result of that investment, 5-hour ENERGY can be found in more than 100,000 retail stores and health clubs throughout the United States and Canada. (2d Am Verified Compl ¶ 20, App 19a.)

Befitting the Information Age, Innovation Ventures recognizes that there is certain information that is vital to its success and continued existence. (Dolmage Aff ¶ 5, App 235a.) For Innovation Ventures, this information includes the formula for 5-Hour ENERGY, manufacturing processes, pricing strategy, market data, and supply-chain information. (*Id.*) To

ensure that Innovation Ventures' confidential information and trade secrets are not used by competitors, Innovation Ventures requires its employees and suppliers to execute confidentiality and nondisclosure agreements. (*Id.*)

In 2007, Innovation Ventures wanted to improve the quality of its product through better manufacturing and packaging. (Henderson Aff ¶ 4, App 225a.) It retained K&L, and its principal, Andrew Krause, to help design, manufacture, and install manufacturing and packaging equipment. (*Id.*) Innovation Ventures also contracted with Liquid to bottle and package 5-Hour ENERGY. (2d Am Verified Compl ¶ 11, App 17a.) K&L, Krause, and Liquid executed various contracts in which they agreed to maintain the confidentiality of Innovation Venture's information, not to provide services to Innovation Ventures' competitors, and not to disclose Innovation Ventures' information to third parties. (Dolmage Aff ¶¶ 12-13, App 237a-238a.)

About a year after Krause and K&L Development's long-term business relationship with Innovation Ventures ended, Krause and Paisley started a new business to produce competing energy shots. (Krause Aff ¶ 6, App 9a; LXR Operating Agmt 1, App 308a; Eternal Energy Operating Agmt 1, App 306a.) They created Defendants Eternal Energy, LLC, and LXR Biotech, LLC to market and distribute their competing products. (*Id.*) Unbeknownst to Innovation Ventures, Krause and Paisley contracted with Liquid to manufacture and package their energy shots using Innovation Ventures' equipment. (Krause Aff ¶ 11, App 10a.)

Innovation Ventures engages Liquid to bottle 5-hour ENERGY

In March 2007, Innovation Ventures first contracted with Liquid to manufacture 5-hour ENERGY. (See Am Mfg Agmt 1, App 63a.) Innovation Ventures insisted that Liquid execute a confidentiality agreement. (See Confidentiality Agmt, App 58a.) Only then did Innovation Ventures agree to a manufacturing agreement. (Am Mfg Agmt § 1, App 63a.)

A few months later, Liquid and Innovation Ventures amended their manufacturing agreement. (Am Mfg Agmt, App 63a.) Liquid again agreed to protect Innovation Ventures' confidential information and intellectual property. (*Id.* §§ 16, 21, App 70a, 72a.) Liquid also agreed to produce energy drink products exclusively for Innovation Ventures for the duration of the parties' agreement and not to produce energy drink products in competition with Innovation Ventures for three years thereafter. (*Id.* § 17, App 70a.)

The manufacturing agreement involved a detailed agreement relating to production equipment. (*Id.* §§ 8, 20.b, App 66a-67a, 71a.) Because Innovation Ventures pioneered the energy-shot market, Innovation Ventures and Liquid could not simply purchase a complete energy-shot bottling and packaging line. (Henderson Aff ¶ 15, App 228a-229a.) Instead, Innovation Ventures pieced together various components and made extensive modifications to meet its quality, sales, and production needs. (*Id.*) Accordingly, the parties agreed that Innovation Ventures could provide production equipment for Liquid's use, and it could also require Liquid to obtain specific production equipment. (Am Mfg Agmt § 8.a, App 66a.) When the manufacturing agreement ended, Innovation Ventures had the right to purchase any production equipment Liquid had acquired. (*Id.* § 10, App 68a.)

Over the next three years, Innovation Ventures paid Liquid millions of dollars to manufacture more than 80 million bottles of 5-hour ENERGY. (Compare Am Mfg Agmt §§ 4.a., 20.b., App 65a, 71a, with Termination Agmt ¶ 6, App 104a-105a (purchase price shows more than 80 million units sold).)

Innovation Ventures retains Krause to design and build manufacturing equipment and Krause's role expands

In 2007, Innovation Ventures also retained K&L and Krause to help design, manufacture, and install manufacturing and packaging equipment to meet the production needs of 5-hour

ENERGY. (See Henderson Aff ¶ 4, App 225a.) When Krause began working with Innovation Ventures, he had no knowledge or experience with liquid energy shots. (*Id.* ¶ 8, App 225a.)

Krause initially worked to develop manufacturing and packaging equipment. Krause helped Innovation Ventures resolve several challenges in manufacturing and packaging 5-hour ENERGY. (See Henderson Aff ¶ 15, App 228a.) Specifically, he modified production equipment to eliminate waste, ensure uniform label application, apply the proper torque to reduce leakage without stripping the neck from the bottle, and speed the packaging process. (*Id.*) In his own words, Krause "engineered every aspect of the design" of Innovation Ventures' two-pack machine including five separate, patented modules. (4/29/2009 email from Krause to Smith, App 315a-316a.) This patented manufacturing equipment was designed and built at Innovation Ventures' headquarters, and installed at Liquid's facility. (Henderson Aff ¶ 4, App 225a.)

Krause also helped Innovation Ventures develop, at significant expense, a patented cap that prevents leaks and allows customers to easily remove the shrink wrap from the cap. (*Id.* ¶¶ 10-13, App 227a-228a; 4/29/2009 email from Krause to Smith, App 315a-316a.) The patented cap dramatically improves the quality of Innovation Ventures' packaging over competitors. (Henderson Aff ¶ 12, App 227a-228a.)

Innovation Ventures provided Krause with office space at its headquarters. (2d Am Verified Compl ¶ 36, App 22a-23a.) Krause shared an open workspace with Innovation Ventures' executives, and was privy to all aspects of Innovation Ventures' operations. (*Id.*) Krause directly negotiated contracts with Innovation Ventures' suppliers, giving him access to highly sensitive and confidential pricing and supplier information. (See *id.* ¶ 9.h., App 17a; 4/29/2009 email from Krause to Smith, App 315a-316a.)

Innovation Ventures' contracts with Krause and K&L Development

For two years, Innovation Ventures, Krause and K&L worked together under an oral agreement, but with the intent of executing a written contract. (Henderson Aff ¶¶ 4-5, App 225a; Equipment Mfg & Installation Agmt 1, App 76a.) In April 2009, the parties memorialized their existing contract in writing, and amended it to address the design and manufacture of a second production line. (EMI, App 70a-92a; Nondisclosure & Confidentiality Agmt, App 94a-99a.) The parties executed the Equipment Manufacturing and Installation Agreement, or EMI, and the Nondisclosure and Confidentiality Agreement on April 27, 2009. (*Id.*)

The impetus for memorializing the relationship with Krause came from a change in Innovation Ventures' business model. It was bringing production in-house to a facility in Indiana. (See 2d Am Verified Compl ¶ 45, App 24a-25a.) Innovation Ventures needed a second production line for its Indiana facility, and negotiated a contract for Krause and K&L to design, manufacture, and install it. (EMI, App 76a-92a.) The parties agreed to a timeline from design to installation of three months, starting on March 9, 2009 and ending in early June 2009, with an additional 45 days for acceptance. (*Id.* §§ 2.2, 2.3, App 77a-78a, Scheds C, D, App 89a-91a.) Krause was to complete the manufacture of the second production line by May 9, 2009. (*Id.* § 2.3 & Sched C, App 78a, 90a.) Innovation Ventures agreed to pay Krause $153,000, in installments, to manufacture and install the second production line. (*Id.* Sched B, App 88a.)

The EMI contains three provisions protecting Innovation Ventures' confidential information and intellectual property. Consistent with their earlier oral contract, Krause and K&L affirmed that any intellectual property related to the production equipment that it manufactured for Innovation Ventures belongs to Innovation Ventures. (*Id.* 1, § 8.1, App 76a, 81a-82a.) The contract included a confidentiality provision. (*Id.* § 9, App 82a-83a.) And Krause and K&L Development reaffirmed their existing agreement that, in the energy-shot

market, they would provide services exclusively to Innovation Ventures. (*Id.* § 10, App 83a.) Krause agreed as follows:

> During the term of this Agreement and for a period of five years thereafter, within the United States, Canada, Mexico, or the EU, Contractor shall not design, manufacture, produce or participate directly or indirectly in the design or manufacture of any product similar to the Equipment with the same or similar purpose of bottling one to four ounce bottles of liquid energy shots. [*Id.*]

On behalf of K&L, Krause also executed a written nondisclosure agreement to protect Innovation Ventures' intellectual property. The written agreement broadly defined confidential information to include information K&L Development had already obtained from Innovation Ventures during the parties' contractual relationship under the oral agreement, and barred disclosure of that information. (Nondisclosure Agmt § 1, App 94a.) The agreement further required K&L Development to obtain written confidentiality agreements from each of its employees who worked on projects for Innovation Ventures, including Krause. (*Id.* §§ 2.7, 2.8, App 95a.) Innovation Ventures specifically reserved the right to enforce the K&L employee-signed confidentiality agreements as a third-party beneficiary. (See *id.* § 2.11, App 95a.)

The EMI provided that the parties' contract would terminate upon the successful installation and acceptance of the second production line, without cause on 14-days' notice from any party, or upon material breach by K&L or Krause. (EMI § 12.1, App 83a-84a.) The Nondisclosure Agreement did not contain a termination provision. Innovation Ventures ended its relationship with Krause in May 2009.[1] (Krause Aff ¶ 5, App 9a.) The precise date and reason that the contract ended is not in the record because discovery has not been completed.

[1] The Court of Appeals stated that the parties' relationship ended around May 10, 2009. (COA Op 3, App 356a.) The trial court believed that the parties' relationship ended "just two weeks" after the agreements were executed. (3/15/2013 Op & Order 27, App 343a.) But the only record evidence on this point is a single line in Krause's Affidavit: "My work for [Innovation Ventures] was terminated in May, 2009 by Living Essentials." (Krause Aff ¶ 5, App 9a.)

But by the time the parties' relationship ended, Innovation Ventures, K&L, and Krause had been working together on the second production line for about two months, with installation due a month later. (See EMI Sched D, App 92a.) There is no record evidence that the parties' relationship would have continued after the second production line was installed and accepted.

Innovation Ventures in-sources production but allows Liquid limited use of Innovation Ventures' proprietary production equipment

In 2009, Innovation Ventures told Liquid that Innovation Ventures would be opening a production facility in Indiana, but continued to pay Liquid to bottle 5-hour ENERGY. (See 2d Am Verified Compl ¶ 45, App 24a-25a.) In 2010, Innovation Ventures was ready to shift production to its Indiana facility. (*Id.* ¶ 46, App 25a.) Liquid and Innovation Ventures ended their manufacturing agreement effective April 22, 2010. (Agmt to Terminate & Exercise Purchase Option 1, App 101a.) Innovation Ventures exercised the purchase option in the Amended Manufacturing Agreement and purchased the production equipment that Liquid had acquired to manufacture 5-hour ENERGY. (*Id.* § 6, App 104a-105a.) As a result, Innovation Ventures owned all of the production equipment Liquid had used to bottle 5-hour ENERGY. (*Id.*)

The Amended Manufacturing Agreement prohibited Liquid from bottling competitors' energy shots for a period of three years. (Am Mfg Agmt § 17, App 70a.) Still, Innovation Ventures wanted to ensure that Liquid and Peter Paisley continued to thrive. (Dolmage Aff ¶ 7, App 235a-236a.) So, at Liquid's request, Innovation Ventures allowed Liquid to use Innovation Ventures' customized production equipment to bottle energy shots for other companies but only on a limited basis. (*Id.*) Innovation Ventures did not want its competitors to obtain an unfair competitive advantage from Liquid's use of the equipment that incorporated Innovation Ventures' confidential information, patents, and trade secrets. (*Id.* ¶ 11, App 237a.) Accordingly, the parties executed the Agreement to Terminate and Exercise Purchase Option.

In the Termination Agreement, Innovation Ventures agreed to allow Liquid to use Innovation Ventures' manufacturing equipment for a period of one year royalty-free. (Termination Agmt § 6(a), App 104a-105a.) In exchange for use of the production equipment and relaxation of its existing strict exclusivity obligations, Liquid agreed not to produce any competitor's energy drink for three years without Innovation Ventures' pre-approval. (*Id.* § 1(b), App 102a.) Specifically, the parties agreed:

> (1) Permitted Products
>
> (a) [Innovation Ventures] grants Liquid permission to manufacture the Permitted Products (as defined in Section 24 below) subject to each of the conditions of this Agreement. . . .
>
> (b) Other than the Permitted Products, for a period of 3 years from the Effective Date, Liquid shall not produce or formulate other than for [Innovation Ventures] (i) any Energy Drink (as defined in Section 24 below), in packaging of 4 fluid ounces or less, or (ii) any other Energy Drink containing glucuronolactone or tyrosine (in all its forms) regardless of package size. [*Id.* § 1, App 101a-102a.]

The parties defined "permitted products" to include only those products specifically authorized by Innovation Ventures:

> "Permitted Products" are limited to Energy Drinks that meet all three of the following requirements: (i) are on the approved manufacturer's list attached hereto as Exhibit C, as may be amended by the parties in writing from time to time; (ii) at the time which Liquid agrees to manufacture such Energy Drink, the company that owns or formulates such Energy Drink or any Affiliate thereto must not have any active litigation (or threatened litigation) with [Innovation Ventures]; and (iii) by way of labeling, marking or otherwise, must not make any claim that the Energy Drink provides energy to the user for any specific amount or duration of time. [*Id.* § 24(*i*), App 110a-111a.]

The parties further agreed that before Liquid would manufacture any permitted product, it would provide Innovation Ventures with a written nondisclosure agreement executed by the

company affiliated with the permitted product. (*Id.* § 4(b), App 103a.) In that agreement, Liquid's customer would agree not to state or even confirm that its product was being made at the same facility or by the same manufacturer that makes or made 5-hour ENERGY. (*Id.* at Ex D § 1, App 115a.)

Finally, the parties agreed that Innovation Ventures could revoke permission to manufacture the permitted products "at any time . . . for Liquid's violation of this Agreement," provided that Liquid was given 30 days to cure the violation if it could be reasonably cured within that period. (Termination Agmt § 1(a), App 101a.)

Innovation Ventures *immediately approved 36 energy drinks* to allow Liquid to seek new business. The approved products included Red Bull, the world's biggest energy drink manufacturer. (*Id.* §§ 1(a), 24(*i*), Ex C, App 101a, 110a-111a, 114a; Esterl and Lublin, *Corporate News*, Wall Street Journal (Aug 16, 2014), p B3.) As a result, Liquid obtained a competitive advantage in that it could bottle energy shots without any capital investment in specialized production equipment.

Like the parties' earlier contracts, the Termination Agreement required Liquid to protect Innovation Ventures' confidential information and intellectual property. Not only did the Termination Agreement contain confidentiality and non-disclosure provisions (Termination Agmt §§ 2, 4, App 102a-103a), but Liquid agreed to "take all reasonable steps to prevent any representatives from any company affiliated with the Permitted Products from inspecting, photographing, videotaping (or other image capturing), [or] having access to" anything in Liquid's possession or control relating to Innovation Ventures' products (*id.* § 1(a), App 101a). Liquid also agreed that its employees to whom Innovation Ventures' confidential information was disclosed would be made aware of and bound by the agreement. (*Id.* § 2.c, App 102a.)

Liquid only produced three of the 36 approved products. (Liquid's Interrog Resps, Interrog 5, App 286a-287a.) Instead, Liquid got greedy and used Innovation Ventures' equipment to produce products that the Termination Agreement did *not* allow. (See *id.*, Interrogs 4-5, App 286a-287a; Termination Agmt, Ex C, App 114a.) There is no evidence that Innovation Ventures ever rejected a request from Liquid to use Innovation Ventures' equipment to produce a competing product until after it discovered that Liquid was surreptitiously producing a competing product for Krause.

Liquid manufactures Krause and Paisley's Eternal Energy in violation of the Termination Agreement

Around the same time that Innovation Ventures and Liquid were negotiating the Termination Agreement, Krause was developing a competing energy shot, Eternal Energy. (Krause Aff ¶ 6, App 9a.) In a period of less than a month, Krause obtained and finalized the formula for Eternal Energy and found a contract bottler—Liquid. (*Id.* ¶¶ 6-12, App 9a-11a.)

The one hurdle Krause and Paisley faced to using Innovation Ventures' production equipment to produce Eternal Energy was obtaining Innovation Ventures' consent to add Eternal Energy to the permitted products list in the Termination Agreement. Rather than simply ask permission, Krause and Paisley created several companies, including Eternal Energy, LLC and LXR Biotech, LLC, and filed corporate paperwork with the State that did not identify Krause's or Paisley's involvement in the entities. (See 2d Am Verified Compl ¶¶ 57, 63-64, 76-77, App 20a, 30a, 32a.) Then, Paisley and Liquid approached Innovation Ventures to approve the addition of Eternal Energy to the permitted product list. (9/20/2010 email from Criso to Kulpa, App 252a-254a.)

Liquid's email to Innovation Ventures omitted any mention of Krause's or Paisley's involvement. Instead, Liquid represented that the product was launched by a group of five tattoo

parlors (*id.*), even though Krause and Paisley owned two-thirds of LXR and Eternal Energy (LXR Biotech Operating Agmt, Schedule A, App 308a-310a; Eternal Energy Operating Agmt 10, App 306a-307a). Liquid also sent a specific ingredient list for Eternal Energy, along with label artwork. (9/20/2010 email from Criso to Kulpa, App 252a-254a.) Liquid explained that Eternal Energy intended to use tattoo artists' renderings for their labelling, and their distribution strategy was through tattoo parlors. (*Id.*)

Deceived by Liquid, Paisley, and Krause, Innovation Ventures provisionally approved Liquid's request, but referenced the parties' pre-existing understanding that "any change in the included formula shall require Innovation Ventures' additional consent to be re-added as a Permitted Product." (9/21/2010 email from Kulpa to Criso, App 147a.) In other words, a product with different ingredients but the same name would require separate approval. (See *id.*)

Liquid and Innovation Ventures had no further discussion about Eternal Energy until the next year. In the meantime, after more than eight months of royalty-free use of Innovation Ventures' equipment, Liquid agreed to buy the equipment from Innovation Ventures for $275,000, paid in installments. (Equipment Purchase Agmt ¶¶ 2-3, App 122a.) Innovation Ventures continued to have an ownership interest in the production equipment until December 2011. (See *id.*) The purchase agreement did not modify Liquid's duties under the Termination Agreement to keep Innovation Ventures' information confidential, to protect its intellectual property, and to limit its manufacture of energy drinks to the permitted products until April 2013. (See generally, *id.*)

Innovation Ventures heard that Eternal Energy might have boasted to Wal-Mart that their product was manufactured at a facility previously used to manufacture 5-hour ENERGY. (4/20/2011 email from Kulpa to Criso, App 150a.) Innovation Ventures contacted Liquid to

ensure that Liquid would provide a nondisclosure agreement from Eternal Energy before production. (*Id.*) Liquid responded that it had already run two small batches of Eternal Energy. (4/21/2011 email from Criso to Kulpa, App 150a.) Liquid told Innovation Ventures that it would "send you a copy of the [nondisclosure agreement] with Eternal and reiterate that they cannot use the prior Liquid/[Innovation Ventures] relationship in their product promotion." (*Id.*) Liquid failed to send the nondisclosure agreement. (COA Op 3-4, App 356a-357a.)

Liquid ramped up production of Eternal Energy because Krause and Eternal Energy had obtained a $40 million contract with Wal-Mart. (See Krause Aff ¶ 13, App 11a; Liquid Interrog Resps, Interrog 2, App 285a.) For six months in 2010 and 2011, Liquid used Innovation Ventures' equipment to bottle Eternal Energy for Krause and Paisley's competing business. Liquid later admitted that within *two months* of executing the Termination Agreement, Liquid was already using Innovation Ventures' equipment to bottle other unapproved energy shots. (Termination Agmt 1, App 101a (executed June 2010); Liquid's Resps to Reqs for Admissions 10, 14, 17, App 259a-268a (admitting bottling Quick Energy beginning in August 2010).)

Innovation Ventures' caution that changes to Eternal Energy would require new approval was prescient. The formula for the energy shot Innovation Ventures approved contained 13 ingredients; as produced, Eternal Energy contains 20 ingredients—at least 11 of which are not included in formula Innovation Ventures approved. (Compare 9/20/2010 email from Criso to Kulpa, App 252a-254a, with App 311a-312a.) And Eternal Energy was not using tattoo artists' renderings for artwork. (App 311a-312a.) In sum, the Eternal Energy that Krause and Paisley sold to Wal-Mart was not the Eternal Energy that Liquid had asked Innovation Ventures to add to the permitted products list. The only commonality between the two energy shots was the name. And the product competed directly with 5-hour ENERGY.

Innovation Ventures sues—and learns of additional contract violations

In the following months, Innovation Ventures became increasingly concerned that Defendants were using Innovation Ventures' confidential information and intellectual property to produce and market Eternal Energy in violation of their contractual obligations. (Dolmage Aff ¶¶ 18-21, App 240a-241a.) Innovation Ventures learned about the Eternal Energy sales to Wal-Mart, using a formula that was vastly different from the one it had been shown the year before. (*Id.* ¶¶ 16, 18, App 239a-240a.) Innovation Ventures observed that Eternal Energy was using the same proprietary leak-proof-bottle-cap design that it had hired Krause to develop and which Innovation Ventures had patented. (Henderson Aff ¶ 14, App 228a.) And Innovation Ventures uncovered that Krause was behind Eternal Energy. (*Id.* ¶ 20, App 230a.) That was the last straw. Innovation Ventures sued to enforce its contract rights and protect its trade secrets.

The circuit court ordered Liquid to allow Innovation Ventures to inspect Liquid's facility to determine whether Defendants were manufacturing Eternal Energy and other energy shots that were not authorized by Innovation Ventures. (TRO 3, App 4a.) The court also ordered Liquid to stop manufacturing Eternal Energy or any other energy shots. (TRO ¶ 2, App 3a.)

Innovation Ventures inspected Liquid's facility twice. During the first inspection, Innovation Ventures saw 290,000 bottles of Eternal Energy that Liquid had produced earlier in the month. (Dolmage 2d Aff ¶ 4, App 244a.) Innovation Ventures also uncovered evidence that Liquid was producing E6 and Quick Energy, neither of which was a permitted product (nor had Liquid even sought approval for them). (*Id.* ¶¶ 5-9, App 244a-245a.)

A week later, Innovation Ventures inspected Liquid's facility again. It discovered that Liquid was continuing to manufacture energy shots in violation of the TRO, including E6. (*Id.* ¶¶ 11-13, App 245a.) Innovation Ventures also observed that Liquid was also producing unapproved energy shots with the names Quencher and 9 Hour Empower. (See *id.* ¶¶ 16-19,

App 245a-246a.) Innovation Ventures later learned that Liquid was also producing a second unapproved energy shot for LXR, Perfectly Petite. (See 2d Verified Am Compl ¶¶ 72-74, App 32a.) In sum, Innovation Ventures' court-ordered inspections uncovered evidence that Liquid was producing no fewer than *five* unapproved energy shots in addition to Eternal Energy. In fact, Liquid had produced unapproved products for 18 months before finally getting caught. (See Liquid's Resps to Reqs for Admissions 10-18, App 259a-269a.)

Innovation Ventures sent Liquid notice under the Termination Agreement that it was revoking consent to produce any permitted products because Liquid violated the Agreement. (Pl's Mot for Summ Disp against Liquid, Ex G, 1/27/2012 letter from Dolmage to Paisley.) Liquid responded to Innovation Ventures' notice by, for the first time, producing a nondisclosure agreement executed by Eternal Energy. (*Id.*, Ex H, 2/17/2012 letter from Paisley to Dolmage.) Liquid claimed that by producing the nondisclosure agreement, it had cured any breach, despite misleading Innovation Ventures into provisionally approving Eternal Energy by hiding that Krause and Paisley were behind it, and despite Liquid's production of numerous other unapproved energy shots. (*Id.*)

Following the inspections, Innovation Ventures amended its complaint to allege that Defendants breached various contractual obligations, violated the Michigan Uniform Trade Secrets Act by using Innovation Ventures' trade secrets, and committed various business torts. (2d Am Verified Compl, App 14a-150a.) The verified complaint averred that Krause and his companies' ability to rapidly achieve such a high level of production and product placement in a short period was the direct result of using Innovation Ventures' confidential information and trade secrets, in violation of Innovation Ventures' agreements with Liquid, K&L, and Krause. (*Id.* ¶ 86, App 34a.)

In its Answer, K&L identified a laundry list of affirmative defenses. (K&L and Krause's Ans 18-19, App 219a-220a.) Nowhere in that list did K&L and Krause assert the affirmative defenses of want or failure of consideration. (See *id*.)

The trial court grants summary disposition before discovery is complete

The procedural history of the case in the trial court is unusual. The court allowed emergency discovery in the TRO that not only confirmed the violations alleged in the original complaint, but also uncovered numerous other violations. (See Dolmage 2d Aff ¶¶ 1-22, App 244a-296a.) But the court then refused to allow Innovation Ventures any further discovery and stayed all discovery pending Defendants' early motions for summary disposition.[2]

The court initially denied Defendants' motions except as to tortious-interference claims against Krause and Paisley. (6/15/2012 Op & Order, App 151a-167a.) In its opinion, the court specifically noted that "virtually every material fact is vigorously contested by the parties" and that additional discovery was necessary. (*Id.* at 15, App 165a; see *id.* at 5-13, App 155a-163a.)

Discovery proceeded fitfully for five months. (Discovery timeline, App 281a.) While discovery was pending, Innovation Ventures produced thousands of documents to Defendants,

[2] Ever since the TRO hearing, Defendants have cited a *Forbes* magazine story to suggest this litigation is motivated by a desire to crush Innovation Ventures' competition. (E.g., Defs' Ans to Appl'n for Leave to Appeal 9.) But the story's author exercises journalistic embellishment. There is no "cemetery" and no tombstones commemorating defunct companies. A modicum of research demonstrates this. (See ABC News, 5-Hour Energy Empire Under Scrutiny Video (Sept 11, 2012), available at http://goo.gl/5x4dMz (last visited Sept 9, 2015).) The contemporaneous video shows three cartoon "tombstones" in front of products made by the Coca-Cola Company, Pepsico, and Nitro2Go, all still in business. There are no "tombstones" in front of the dozens of other energy-shot products. Defendant Krause knows this because he worked a few yards away from the shelf, and regularly had meetings in the room where the shelf was located. Moreover, none of the competitors' products on the shelf in the story are being made by Innovation Ventures' former business partners, all of whom had no qualms about non-compete and nondisclosure agreements when they were handsomely profiting from their relationship with Innovation Ventures.

but Defendants collectively produced only a handful of documents, with Krause and his companies producing fewer than 10 documents. (See Pl's Opp'n to Liquid's Mot for Summ Disp, Ex H.5 (Liquid's total production is included).) Because of the incomplete document discovery, neither party took any depositions. When Innovation Ventures sought discovery from third parties, including Defendants' customers and business associates, the trial court again stayed discovery while Defendants filed new summary-disposition motions. (COA Op 4, App 357a.) In short, Innovation Ventures has not yet had the opportunity to conduct even the most basic discovery necessary to discern how extensively Defendants have breached their agreements. (See Pl's Opp'n to Liquid's Mot for Summ Disp, Ex H.)

In their second round of summary-disposition motions, Defendants asserted generically that all claims should be dismissed, but they only argued for dismissing Innovation Ventures' breach-of-contract claims. (See 12/21/2012 Mots for Summ Disp.) Defendants never contended that there was any failure of consideration for Krause and K&L Developments' contracts with Innovation Ventures. (See generally, *id.*)

Even though discovery had not been completed and no depositions had occurred since its earlier ruling denying summary disposition, the court reversed course and granted summary disposition in favor of Defendants as to all claims, not just the contract claims the parties had addressed. (3/15/2013 Op & Order, App 317a-353a.)

The trial court concluded that Liquid's agreement to obtain Innovation Ventures' pre-approval to produce energy drinks on Innovation Ventures' customized production equipment was not reasonable and therefore not enforceable. (*Id.* at 21-24, App 337a-340a.) The court was particularly troubled by the fact that roughly a year after the Termination Agreement went into effect, Liquid purchased the customized equipment from Innovation Ventures but continued to

be bound by its agreement to limit its use of the equipment. (*Id.* at 23-24, App 339a-340a.) The court refused to enforce the post-sale restrictions on the use of personal property agreed to by two corporations. The trial court did not acknowledge that, but for the pre-approval limitation, Innovation Ventures never would have licensed or sold its customized, patented equipment to Liquid at all, or that Innovation Ventures had an ownership interest in the property for almost the entire period at issue.

The trial court's assessment of whether the parties had struck good deals continued. The court concluded that K&L's Nondisclosure Agreement was not supported by adequate consideration, ignoring the fact that it memorialized a years-long oral agreement between the parties. (*Id.* at 25-28, App 341a-344a.) Specifically, the court reasoned that K&L entered into the Nondisclosure Agreement to provide additional services to Innovation Ventures. (*Id.* at 26, App 342a.) The court conceded that continuation of the business relationship was adequate consideration at the time the agreement was executed. (*Id.*) But the court assumed—without the benefit of discovery or any record evidence—that "K&L was not given any additional work under the contract, because Plaintiff terminated the contract two weeks after it was signed. Because the parties' relationship did not continue, it cannot provide consideration for the agreement extracted from K&L." (*Id.*) The court did not acknowledge that when K&L, Krause, and Innovation Ventures executed the EMI and the Nondisclosure Agreement, they anticipated that their relationship would effectively end less than two months later and potentially within 14 days or fewer. (See EMI §§ 2.2, 2.3, App 77a-78a, Scheds C-D, App 89a-92a.)

Finally, the trial court determined that none of the information related to the production of 5-hour ENERGY could possibly be a trade secret. Specifically, the court reasoned that when Innovation Ventures licensed the use of its customized production equipment to Liquid for the

production of competing products, all of its confidential information was disclosed to those competitors. (3/15/2013 Op & Order 29-30, App 345a-346a.) The court did not address how Liquid's use of Innovation Ventures' customized equipment would reveal to those competitors information about Innovation Ventures' suppliers, its customers, its pricing, the pricing it obtained from suppliers, its profit margins, or any of the other myriad details that Liquid, Krause, and K&L Development learned exclusively from their work with Innovation Ventures and then used in direct competition with it.

The Court of Appeals affirms the circuit court's decision

The Court of Appeals affirmed the circuit court's decision, albeit for different reasons. The court agreed that the limitations on Liquid's use of Innovation Ventures' customized production equipment were unenforceable. (COA Op 7, App 360a.) Like the trial court, the Court of Appeals based its analysis on cases addressing the enforceability of non-compete agreements in the employment context, rather than in commercial transactions. (See *id.* at 7-8, App 360a-361a.) The court agreed that preventing anti-competitive use of Innovation Ventures' confidential information is a legitimate business interest that would support a restrictive covenant. (*Id*. at 8, App 361a.) But the court concluded that because Innovation Ventures allowed Liquid to use Innovation Ventures' production equipment to produce some competing products (and thus the use of Innovation Ventures' confidential information and intellectual property incorporated in the production equipment), it could not bar Liquid's unfettered use of that information and intellectual property. The effect of the court's ruling is that an agreement between two corporations to prevent all competitive use of a corporation's property is reasonable, but an agreement allowing limited competitive use is not.

In conducting this analysis, the Court of Appeals incorrectly asserted that Innovation Ventures was only claiming that the production of Eternal Energy and Perfectly Petite violated the Termination Agreement. (*Id.* at 6, App 359a.) As the Verified Complaint and Innovation Ventures' appeal brief make clear, Innovation Ventures has always maintained that production of Eternal Energy—and all the other unapproved energy shots—violated the contract. (2d Am. Verified Compl ¶¶ 95, 159, App 36a-38a, 51a-52a; Appellant's COA Br 20-21.)

The Court of Appeals then turned to the enforceability of the Nondisclosure Agreement and the EMI. It rejected the trial court's conclusion that the agreements were not supported by adequate consideration, noting that because the agreements recited the continuation of the business relationship, "the agreements, on their face, contained valid consideration . . . ." (COA Op 10, App 363a.) However, the court adopted a new theory for why the contracts could not be enforced, one Defendants and the trial court had never identified: failure of consideration. (*Id.* at 10-12, App 363a-365a.) The court reasoned that because Innovation Ventures "terminated the business relationship within two weeks after the agreements were signed, plaintiff's forbearance in terminating the relationship amounted to a nullity." (*Id.* at 11, App 364a.) The court relied on cases from other jurisdictions imposing a requirement that for continuation of employment to constitute consideration, it must be for "a substantial time." (*Id.*) The court apparently concluded that the continuation of the business relationship was the only consideration Krause and K&L received, and that the parties' performance did not begin until after the contracts were executed. Although the court explained that failure of consideration results in rescission of the contracts, it did not remand the case to the trial court to restore the parties to their pre-contract positions. Rather, the court deemed the restrictive covenants and confidentiality provisions

unenforceable, even though the cases it cited held only that non-competition agreements could be rescinded if continued employment was not sufficiently long. (*Id*. at 11-12, App 364a-365a.)

The Court of Appeals affirmed the circuit court's rejection of Innovation Ventures' other claims. It relied on Krause's claims that he did not receive any confidential information from Innovation Ventures and Innovation Ventures' purported failure to "make any effort to keep the bottling process a trade secret" (*id.* at 13, App 366a), despite disputed questions of material fact on these very points created by Innovation Ventures' countervailing affidavits. (Dolmage Aff ¶¶ 4-6, 11, App 234a-237a; Henderson Aff ¶¶ 9-12, 19, App 225a-230a.) The court limited the trade secrets to those associated with the production equipment, passing over the trade secrets related to Innovation Ventures' pricing, suppliers, customers, and marketing. And the court rejected Innovation Ventures' argument that it was unable to identify all of the specific trade secrets that Defendants misappropriated because discovery was not completed and there had been no opportunity to depose Krause, Paisley, or any other witnesses. (COA Op 17, App 370a.)

STANDARD OF REVIEW

This Court reviews summary-disposition decisions de novo "to determine if the moving party is entitled to judgment as a matter of law." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Under MCR 2.116(c)(10), courts must consider the evidence submitted by the parties "in the light most favorable to the party opposing the motion." *Id.* at 120.

SUMMARY OF ARGUMENT

The Court of Appeals erred in three distinct ways. First, the court invalidated the EMI and the Nondisclosure Agreement with Krause and K&L because Innovation Ventures purportedly terminated those agreements too quickly after execution. The Court of Appeals'

decision improperly evaluates the adequacy of the parties' consideration, is inconsistent with the contracts' plain language authorizing the termination, and improperly transformed an alleged partial failure of consideration into a wholesale invalidation of the agreements.

Second, the Court of Appeals invalidated an agreement whereby Innovation Ventures allowed Liquid to use its proprietary equipment to manufacture competitive energy shots provided Innovation approved the products so produced. In so ruling, the court erroneously applied Michigan law regarding non-compete covenants in the employment context. Under the Michigan Antitrust Reform Act, the appropriate analysis is the rule of reason. And there is nothing unreasonable about Innovation Ventures' desire to cabin the use of its own equipment.

Finally, the Court of Appeals granted summary disposition on Innovation Ventures' claims of trade secret misappropriation before meaningful discovery had been conducted on those claims. Having already uncovered substantial evidence of Defendants' breach of their promises not to compete or use Innovation's confidential and proprietary information, Innovation Ventures was entitled to full document disclosure and depositions to determine the full extent of the violations and how Defendants used Innovation's information.

ARGUMENT

I. The Court of Appeals' failure-of-consideration analysis is an impermissible backdoor evaluation of the adequacy of consideration that limits parties' freedom to contract.

K&L and Krause agreed to the terms set forth in the EMI and the Nondisclosure Agreement based on their business judgment that agreeing to keep Innovation Ventures' information confidential and not compete with their customers was worth obtaining business from Innovation Ventures. The Court of Appeals toppled the parties' business judgment because it believed that the few-weeks duration of the parties' business relationship after execution of the

written agreement rendered the bargain K&L and Krause had made worthless. Not only did the Court of Appeals thus assess the reasonableness of the parties' contract, but it overlooked that in the EMI and the Nondisclosure Agreement the parties were memorializing their long-standing oral contract, that performance of the additional business relationship had been ongoing for two months (from March 2009 to May 2009), and that the parties' agreement regarding how and when their agreement could be terminated (within 14 days or fewer).

A bedrock tenet of Michigan's jurisprudence is that "[c]ourts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract." *Rory v Cont'l Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). Consideration is an essential element of a contract. *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 158; 719 NW2d 553 (2006). "Courts do not generally inquire into the sufficiency of consideration." *Gen Motors Corp v Dep't of Treas*, 466 Mich 231, 239; 644 NW2d 734 (2002) (citing *Harris v Chain Store Realty Bond & Mtg Corp*, 329 Mich 136, 145; 45 NW2d 5 (1950)).

Failure of consideration occurs when the consideration that existed at the time the contract was formed becomes worthless or ceases to exist, when there is a failure to perform a substantial part of the contract or failure of one of its essential terms, or when the contract would not have been made if default in that particular had been expected or contemplated. *Adell Broadcasting v Apex Media Sales*, 269 Mich App 6, 12-14; 708 NW2d 778 (2005) (quoting *Black's Law Dictionary* (5th ed)); *Rosenthal v Triangle Dev Co*, 261 Mich 462, 463; 246 NW 182 (1933).

Failure of consideration is different from and greater than a breach of the contract. Failure of consideration, like the absence of consideration, is an affirmative defense.[3] MCR 2.119(F)(3)(a). The party asserting failure of consideration carries the burden of proof. *Adell*, 269 Mich App at 12 (citing *Turner v Peoples State Bank*, 299 Mich 438, 450; 300 NW 353 (1991) (Boyle, J, concurring)). Unlike a breach of contract, the complete failure of consideration warrants the contract's rescission. *Id.* at 13; *Abbate v Shelden Land Co*, 303 Mich 657, 666; 7 NW2d 97 (1942); *Rosenthal*, 261 Mich at 463. If consideration fails, the contract is not just unenforceable—it never existed, and the parties must be restored to the status quo ante. See *Wall v Zynda*, 283 Mich 260, 264; 278 NW 66 (1938). The failure of consideration entirely undoes the arrangement the parties freely made.

The Court of Appeals' decision misapplies the doctrine of failure of consideration for at least three reasons. *First*, considering whether a post-contract-execution business relationship continued long enough to support a restrictive covenant is inconsistent with Michigan law prohibiting courts from assessing the adequacy of consideration. *Second*, a contract cannot be rescinded for failure of consideration when an event occurs that was or could have been contemplated by the parties. *Third*, a written contract that memorializes and modifies an existing oral contract cannot be rescinded based on failure of consideration for the contract modification.

A. The Court should reject the Court of Appeals' "substantial time" analysis because it is contrary to MCL 566.1 and this Court's precedent.

The Court of Appeals' substantial-time rule is inconsistent with Michigan law and should not relieve sophisticated business entities from their contractual obligations.

[3] Defendants Krause and K&L never pled lack of consideration as an affirmative defense. (Krause & K&L's Ans 18-19, App 219a-220a.) Nor did they argue failure of consideration to the lower courts.

As discussed above, Michigan courts do not interfere with parties' freely executed contracts by weighing the sufficiency of consideration. *Gen Motors*, 466 Mich at 239 (citations omitted). Indeed, even the bare opportunity to discuss and possibly resolve a post-warranty complaint with a car manufacturer is legally sufficient consideration. *Id.* at 239-241. In other words, it does not take very much for a court to find adequate consideration; the proverbial peppercorn will do.

No consideration at all is required to modify an existing contract. The mere fact that parties consider it to their advantage to modify their agreement is sufficient consideration for the modification. *Buck v N Dairy Co*, 364 Mich 45, 49; 110 NW2d 756 (1961). The Legislature has specifically provided that an agreement to modify a contract or other obligation is enforceable without additional consideration if it is signed by the party against whom the modification is being enforced. MCL 566.1. The statute provides as follows:

> An agreement hereafter made to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration: Provided, That [sic] the agreement changing, modifying, or discharging such contract, obligation, lease, mortgage or security interest shall not be valid or binding unless it shall be in writing and signed by the party against whom it is sought to enforce the change, modification, or discharge. [*Id.*]

Parties are free to contract based on even the slightest exchange of value, and are free to change their contracts simply because they agree the change is beneficial.

The Court of Appeals' ruling is contrary to both of these legal principles. The Court of Appeals recognized that the trial court erred in assessing the adequacy of the consideration, but despite re-characterizing the issue as one of failure of consideration, made the same mistake. (COA Op 10-12, App 363a-365a.) Requiring that a business relationship continue for a

"substantial period" is a departure "from the traditional refusal to inquire into the adequacy of consideration." *Curtis 1000, Inc v Seuss*, 24 F3d 941, 946 (CA 7, 1994) (Posner, J).

Although the Court of Appeals addressed only the duration of performance after the contract was modified, it was effectively measuring the adequacy of consideration. The Court of Appeals determined that the parties' contracts were unenforceable because the business relationship supposedly only continued for two weeks. But at the time the parties entered into the contracts, they knew that the Nondisclosure Agreement was terminable the next day and the EMI was terminable with two weeks' notice. By treating termination of the contracts in accordance with the agreed-upon terms as a failure of consideration, the court determined that a continued at-will business relationship is inadequate consideration for a contract modification unless it actually continues for a substantial period—i.e., it is no longer at-will. Michigan law does not allow such an analysis because a continued business relationship of any duration is consideration, which is all that is required.

The decisions the Court of Appeals relied on depart from the general rule against considering the adequacy of consideration and do so only in the context of employment non-competition agreements. The rule that the Court of Appeals adopted was developed in other states to address the concern that continued *employment* in an at-will relationship is illusory. In an at-will relationship, the employer can terminate the relationship at any time. If the employee signs a non-compete agreement in exchange for continued employment, the employer can still terminate the employee the next day, but the employee's situation "has dramatically changed in that the employee's ability to leave and pursue the same line of work with a new employer is significantly restricted." *Summits 7, Inc v Kelly*, 886 A2d 365, 370-371 (Vt, 2005). Indeed, the Michigan Legislature has adopted specific statutory protections for non-competition agreements

in the employment context that are not applicable in commercial relationships. See MCL 445.774a. These concerns do not apply to a situation where a consultant or skilled professional like Krause agrees to provide a good or service for a business, but is required to forego doing work for the business's competitors.

Under the Court of Appeals' new rule, a contract modification supported by an agreement to continue a business relationship is subject to rescission or is at least unenforceable if the business relationship does not continue for a substantial period (it is unclear how long). Unlike the cases the Court of Appeals relied on, the court's new rule is not limited to non-compete provisions. The court extended the rule to confidentiality provisions (COA Op 9, App 362a), and the court's reasoning suggests that its rule applies to all manner of contract provisions.

The Court of Appeals' new rule is also inconsistent with MCL 566.1. A court cannot require a party to provide greater consideration than that which the contracting parties agreed upon, where Michigan law provides that no consideration at all is necessary to enforce a contract modification.

Finally, the Court of Appeals' analysis seems to be premised on several factual inaccuracies. First, the Court of Appeals apparently believed that the only consideration Krause and K&L received was two weeks' work. In fact, the parties had been performing under the contract for years, and production of the second production line had been going on for two months. (See EMI 1, App 76a, Sched D, App 92a.) Second, the court seems to have thought that the parties anticipated a lengthy continued business relationship. But the parties' contract demonstrates that they anticipated their relationship would end in June or July—only two or three months after the contract was executed—and could end within 14 days or fewer.

The Court of Appeals' new rule would prohibit using a continued business relationship as consideration for short-duration relationships even where the parties expect that relationship to be worth $153,000. The court's determination that two weeks was not long enough at very least creates uncertainty for businesses that intend to exercise their contractual rights to terminate a relationship with a vendor or employee subject to a non-compete. This is the very uncertainty that the rule against weighing the adequacy of consideration is intended to prevent. That rule should be applied here, not the Court of Appeals' unworkable analysis. The practical application of the Court of Appeals' analysis leads to illogical and untenable results that are inconsistent with the intent of the parties and demonstrates why courts have long refused to assess the adequacy of consideration. The rule adopted by the Court of Appeals is inconsistent with Michigan statutory and common law, and this Court should reject it.

B. The affirmative defense of failure of consideration is not available to protect a party against risks that it either knew or should have known.

Rescission for complete failure of consideration is not available where the purported basis for the failure of consideration is an event that was or could have been contemplated by the parties. Stated differently, where an act or default was or should have been contemplated and the parties proceed to contract, a party is not entitled to rescission when that act or default occurs. See *Rosenthal*, 261 Mich at 463; *Crisman-McQuarrie v McQuarrie*, No. 273266, 2008 WL 723970 (Mich Ct App, Mar 18, 2008) (no failure of consideration where the plaintiff should have known that a tax lien on a home would be recorded).

In *Abbate v Shelden Land Co*, 303 Mich 657; 7 NW2d 97 (1942), the Court explained that a party's lawful act does not give the other party the right to rescission for failure of consideration. In that case, the Abbates purchased four lots designated from Sheldon Land Co.

Id. at 659. Ten years later, Sheldon obtained judicial vacation of the portion of the plat in which the Abbates' lots were located so that it could build single-family houses. *Id.* at 660. The Abbates sued to rescind their purchase of the lots, claiming failure of consideration. *Id.* at 664. The Court held that Sheldon had a lawful right to vacate the plat, and that the Abbates knew when they purchased their lots that the plat could be legally vacated. *Id.* at 664-665. Accordingly, the Court concluded that vacation of the plat did not constitute failure of consideration.

Here, the Court of Appeals *sua sponte* concluded that "the discontinuation of the business/employment relationship within two weeks of the signing of the [EMI and Nondisclosure] agreements constituted a failure of consideration."[4] (COA Op 10, App 363a.) But termination by either party within even two weeks was anticipated by the parties and consistent with their agreements.

The Nondisclosure Agreement does not contain a term provision. Under Michigan law, a contract for an indefinite term that does not specify the manner of termination is terminable at the will of either party. *Lichnovsky v Ziebart Int'l Corp*, 414 Mich 228, 240-241; 324 NW2d 732 (1982). Accordingly, when the parties executed the Nondisclosure Agreement, they agreed that either party could terminate their business relationship at any time.

The EMI does contain a term provision. The EMI expired upon K&L Development and Krause's completion of the second production line—which could have occurred before mid-June 2009. (EMI § 12, App 83a-84a, Sched D, App 92a.) The EMI would also expire upon any

[4] The court did not address whether K&L and Krause received additional consideration identified in the EMI and Nondisclosure Agreements, most notably payments of up to $153,000 for a new production line. (See Nondisclosure Agmt 1, App 94a ("in consideration of the business relationship between Living Essentials and Contractor *and of the payments to be made by Living Essentials pursuant to that relationship* . . .).)

material breach by Krause or K&L, or upon 14-days advance written notice from any party. (EMI § 12.1, App 83a-84a.) There is no evidence that Innovation Ventures breached the parties' agreement by ending the parties' relationship in May 2009, with or without notice. The absence of any allegation by Krause or K&L in this litigation that they were not paid supports the inference that Innovation Ventures paid them consistent with the contract.

According to the Court of Appeals, the Nondisclosure Agreement and EMI are unenforceable in their entirety (yet somehow not rescinded) because Innovation Ventures did precisely what the parties contemplated could happen. In other words, in the absence of any evidence that Innovation Ventures breached the parties' contracts, the Court of Appeals relieved Krause and K&L from the obligations they freely accepted. This cannot be reconciled with basic contract-law principles. The Court of Appeals' application of the doctrine of failure of consideration should be rejected because it allows for the rescission of contracts based on occurrences that the parties actually anticipated.

C. The failure of consideration for a modification to an existing contract does not operate to rescind that existing contract.

"[T]he freedom to contract also permits parties to enter into new contracts or modify their existing agreements." *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 370-371; 666 NW2d 251 (2003). The Court of Appeals wrongly interfered with the parties' freedom to contract by ruling that because the consideration for a modification of the parties' contract failed, the entire contract was unenforceable. If consideration for a contract modification fails, the original contract is unaffected.

Innovation Ventures, K&L, and Krause memorialized their existing business relationship and set forth the terms governing their relationship going forward in two concurrent writings that were signed by both parties. (EMI, App 76a-92a; Nondisclosure Agmt, App 94a-99a.) The

parties agreed that their existing oral agreement regarding Line 1 "included entering into a written agreement containing the terms set forth [in the EMI]." (EMI 1, App 76a.) The parties modified their agreement to address the services K&L and Krause would provide going forward—the design, manufacture, and installation of a second production line.

No additional consideration was necessary as the parties were modifying their existing oral contractual relationship. See MCL 566.1. Nonetheless, the parties provided additional consideration in the form of the design, manufacture, and installation of the second production line and payment of $153,000 in installments.

The Court of Appeals erred by assessing the consideration provided for the contract modification separate from the consideration for the parties' contract as a whole. There is no dispute that Krause and K&L received valid consideration for the parties' contractual relationship as a whole. It lasted for years, and included various services rendered by K&L and Krause, and payments by Innovation Ventures. This means that the EMI and its exclusivity provision, which according to the EMI was part of the parties' oral contract, are enforceable. But because written instruments executed at the same time, by the same parties, for the same purpose, executed as elements of one transaction, must be read together as a single contract, the consideration provided for the contract as a whole is sufficient to support the Nondisclosure Agreement as well. *Paepcke v Paine*, 253 Mich 636, 640; 235 NW 871 (1931); *Savercool v Farwell*, 17 Mich 308, 317 (1868) ("The general rule that contracts made at same time, between same parties, with reference to same subject matter, are to be construed together, applies, though the contracts are executed at different times"). Accord 11 Williston on Contracts § 30:26 (4th ed.) ("[W]ritten instruments executed at the same time, by the same contracting parties, for the same purpose, and

in the course of the same transaction will be considered and construed together as one contract or instrument, even though they do not by their terms refer to each other.").

Further, even ignoring the years-long contractual relationship between the parties, as the Court of Appeals did, it erred by assuming that the parties' continued business relationship after the date the contracts were executed was the total consideration provided by Innovation Ventures to Krause and K&L. The EMI specifically identifies that the parties' performance of the contracts began more than a month before the parties executed the contracts. (See EMI, Sched D, App 92a.) Krause and K&L began performance of the consideration for their contract on March 9, 2009. (*Id.* § 3.1.1, Sched D, App 79a, 92a.) The absence of any allegation by Krause or K&L in this litigation that they were not paid for their services is telling. And this consideration supports the EMI and the Nondisclosure Agreement, which identifies the payments to be made by Innovation Ventures. (Nondisclosure Agmt 1, App 94a.)

Because the Court of Appeals' failure-of-consideration analysis is not based on the consideration actually provided for their contract, this Court should reverse.

II. The Court of Appeals erred by refusing to enforce Liquid's agreement to manufacture energy-shot products only for pre-approved competitors of Innovation Ventures.

Innovation Ventures allowed Liquid to use its customized energy-shot production equipment royalty-free to manufacture competing energy drinks, subject to Innovation Ventures' prior approval. Innovation Ventures could have prevented Liquid from producing *any* competing products by simply removing its equipment after it transitioned production in-house, or enforcing Liquid's three-year exclusivity obligation. But because Innovation Ventures acceded to Paisley's request and allowed Liquid to use Innovation Ventures' equipment to produce pre-approved competing products, the lower courts determined Innovation Ventures'

agreement with Liquid was an unreasonable and unenforceable restraint on trade. The Court of Appeals' analysis misapplies the rule of reason because it applied the heightened scrutiny imposed by the Legislature on employment non-compete agreements to the parties' commercial contract, and it ignored the context of the parties' agreement by failing to recognize that the partial exclusivity provision in the Termination Agreement promoted competition.

A. The partial exclusivity provision in the Termination Agreement is not an unreasonable restraint on trade because it promotes competition.

The Michigan Antitrust Reform Act ("MARA") applies to determine the enforceability of agreements alleged to be in restraint of competition. Section 2 of MARA sets forth a general standard: "A contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful." MCL 445.772.

Courts have interpreted MCL 445.772 to incorporate the common-law rule of reason. *Bristol Window & Door, Inc v Hoogenstyn*, 250 Mich App 478, 486, 494-495; 650 NW2d 670 (2002). Cf. *State Oil Co v Khan*, 522 US 3, 10 (1997) (noting that the federal courts have adopted the same analysis with regard to similar language in the Sherman Act). The rule of reason provides that contracts in restraint of trade are valid "if, considered with reference to the situation, business and objects of the parties, and in the light of all the surrounding circumstances with reference to which the contract was made, the restraint contracted for appears to have been for a just and honest purpose, for the protection of the legitimate interests of the party in whose favor it is imposed, reasonable as between them and not specially injurious to the public . . . ." *Hubbard v Miller*, 27 Mich 15, 19 (1873).

Under the analogous Sherman Act, the U.S. Supreme Court has explained that among the circumstances that must be considered is whether the agreement has anticompetitive effects. See *Continental T V, Inc v GTE Sylvania Inc*, 433 US 36, 59 (1977). There must be an actual

adverse effect on competition as a whole in the relevant market. *Major League Baseball Props, Inc v Salvino, Inc*, 542 F3d 290 (CA 2, 2008). In other words, for an agreement to be an unlawful restraint on trade, it must have an actually anticompetitive effect in the market. This is consistent with the language of MARA, prohibiting "[a] contract . . . in restraint of . . . trade." MCL 445.772. Contracts that do not restrain trade are not prohibited.

The partial exclusivity provision in the Termination Agreement is not a contract in restraint of trade, which "all the surrounding circumstances with reference to which the contract was made" make clear. See *Hubbard*, 27 Mich at 19. At the time the parties executed the agreement, Innovation Ventures owned all of the specialized production equipment that Liquid needed if it was going to bottle energy shots. One of the benefits of owning property is the freedom to decide who can use it. Indeed, we learn this at an early age. If you bring your toy to school, you get to decide who can play with it. You can keep it for yourself. You can share it with your friends. You can chose not to share it with the kid who tried to cut in line. And if you share it with a friend who then does something you don't like with your toy, you can take it back. Your ownership of the toy allows you to control its use.

So goes the law. In an analogous situation, the Court affirmed an agreement under the rule of reason because the agreement did not decrease competition. In *Staebler-Kempf Oil Co v Mac's Auto Mart, Inc*, 329 Mich 351; 45 NW2d 316 (1951), the Court enforced an agreement requiring the purchasers of a gas station to buy gasoline from the property seller and setting the price the station could charge for the fuel. The Court reasoned that because "there can be no question" that the property seller could have imposed the same requirements if it had retained ownership, the requirements were reasonable. *Id.* at 357. The Court then noted the absence of any significant anticompetitive effort. *Id.* at 358. The same analysis should be applied here.

Under the parties' Amended Manufacturing Agreement, Innovation Ventures was entitled to remove all of its production equipment. (Am Mfg Agmt §§ 8.d., 20.b, App 67a, 71a.) Given the absence of off-the-shelf production lines for producing energy-shot drinks, removal of the production equipment would have effectively prevented Liquid from bottling *any* energy drinks. Period. (See Dolmage Aff ¶ 7, App 235a-236a.) Further, Liquid had agreed to produce only Innovation Ventures' energy shots for the duration of the Amended Manufacturing Agreement and not compete with Innovation Ventures for three years after termination. (Am Mfg Agmt § 17, App 70a.) There is little question that the exclusivity provision in the Manufacturing Agreement was valid to protect Innovation Ventures' goodwill and confidential information. *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 158; 742 NW2d 409 (2007) (protecting confidential information is a legitimate business reason for a non-competition agreement); *Lieghio v Loveland Invs*, No 285393, 2009 WL 3491620, at *5 (Mich Ct App, Oct 29, 2009) (covenants not to compete are a "reasonable restraint on a seller's competitive efforts in order to promote the buyer's realization of goodwill"). Consequently, at the time the parties negotiated the Termination Agreement, Liquid was practically and legally unable to bottle energy drinks for anyone but Innovation Ventures.

The Termination Agreement eased these lawful restrictions and promoted competition in the energy-shot market in two ways. *First*, Innovation Ventures released Liquid from the Manufacturing Agreement's broad exclusivity provision, allowing Liquid to bottle some competitors' products. (Termination Agmt §§ 1, 24(i), Ex C, App 101a, 110a-111a, 114a.) The products Liquid was authorized to produce were not just small players with a limited distribution; they included Red Bull, the largest player in the energy drink market. (*Id.* at Ex C, App 114a.)

Second, despite purchasing the production equipment, Innovation Ventures left the customized production equipment at Liquid's facility and gave Liquid the license to use Innovation Ventures' equipment royalty-free. (*Id.* §§ 6, 14, App104a-105a, 107a-108a.) Had Innovation Ventures refused to allow Liquid to bottle any of its competitors' products on Innovation Ventures' own equipment, not even an adherent to the teachings of Karl Marx would contend that that Innovation Ventures was acting anti-competitively. When the parties executed the Termination Agreement, Innovation Ventures *promoted* competition by allowing Liquid to use Innovation Ventures' customized equipment to produce competitors' products.

Further, the record demonstrates that in addition to promoting competition, albeit limited competition, the permitted-products limitation in the Termination Agreement served several other purposes: (1) preventing representations by competitors in which they traded on Innovation Ventures' goodwill by reporting that their product was being made by the same company that made 5-hour ENERGY (Dolmage Aff ¶ 11, App 237a); (2) avoiding the misappropriation of Innovation Ventures' confidential information and intellectual property including ingredients, formulas, packaging techniques, and distribution network (*id.*); (3) protecting Innovation Ventures' legitimate interest in its otherwise proprietary information; and (4) avoiding the promotion of competitors' products that infringed on trademarks pertaining to 5-hour ENERGY (see 9/20/2010 email from Criso to Kulpa, App 252a). Thus, under MARA and the rule of reason, the partial exclusivity provision in the Termination Agreement is not an unlawful restraint on trade; it was the necessary prerequisite to promoting trade.

Liquid's purchase of Innovation Ventures' customized production equipment on an installment plan does not change the result. (Contra COA Op 8, App 361a.) First of all, had Innovation Ventures known that Liquid would begin breaching the Termination Agreement

within two months of signing it, it would never have sold Liquid the equipment at all. Further, even if Liquid purchased Innovation Ventures' equipment immediately after the parties ended the Amended Manufacturing Agreement, Liquid would have remained bound by the three-year exclusivity provision. The Termination Agreement relaxed the provision to allow Liquid to bottle pre-approved competitive products. When Innovation Ventures sold the manufacturing line, the relaxed requirements of the exclusivity provision continued to apply. Indeed, Innovation Ventures could have imposed additional limitations on the use of the production equipment as a condition of the sale but did not. See *Staebler-Kempf*, 329 Mich at 357-358.

Accordingly, the Court should restore the appropriate application of the rule of reason, taking into account the circumstances surrounding the contract. Where the context of a restrictive covenant supports protection of one party's intellectual property and goodwill while contemporaneously preserving the future business prospects of the other party, thus enhancing competition, it does not violate MARA and is enforceable. Agreements such as the partial exclusivity provision in the Termination Agreement should be encouraged as an innovative way to promote a fair and healthy business environment, not invalidated. The lower courts' conclusion that the partial exclusivity provision in the Termination Agreement is unenforceable is wrong and should be reversed.

B. The Court of Appeals erred by applying the Michigan Antitrust Reform Act provision governing employment non-competition agreements.

The Court of Appeals did not cite MARA in its analysis of the partial exclusivity provision in the Termination Agreement. It instead relied on cases applying the MARA provision governing employment non-competition agreements. That statute is inapplicable to an agreement between two commercial entities. As a result, the court did not distinguish between

contracts generally and employment non-competition agreements as MARA requires. (See COA Op 6-8, App 359a-361a.) By relying on employment cases, the court engaged in the wrong analysis and failed to consider the context in which the Termination Agreement arose (as required by the rule of reason) and the pro-competitive effect of the Termination Agreement that context illustrates.

The Court of Appeals principally relied on two cases to assess the reasonableness of the partial exclusivity provision in the Termination Agreement, *Coates v Bastian Brothers, Inc*, 276 Mich App 498; 741 NW2d 539 (2007), and *St Clair Medical, PC v Borgiel*, 270 Mich App 260; 715 NW2d 914 (2006). (COA Op 5-8, App 358a-361a.) Neither case involved a contract between two commercial entities; both enforced non-compete provisions in employment contracts. *Coates*, 276 Mich App at 506-511; *St Clair*, 270 Mich App at 262, 264-270. Both cases apply Section 4a of MARA, MCL 445.774a. *Coates*, 276 Mich App at 507-508; *St Clair*, 270 Mich App at 265-266.

In Section 4a, the Legislature adopted authorized covenants not to compete in the employment setting, but provided specific guidelines to determine enforceability. MCL 445.774a. The provision states, in relevant part, as follows:

> An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. [MCL 445.774a(1).]

Covenants not to compete contained in non-employment contexts are not subject to Section 4a, and are analyzed under Section 2. *Bristol Window*, 250 Mich App at 494-498; see *Landscape Forms, Inc v Quinlan*, No 307116, 2012 WL 5290319, at *2 (Mich Ct App, Oct 25,

2012) (An employer-employee noncompetition agreement must fulfill the rule of reason and "additionally" comply with MCL 445.774a.).

Rather than apply the statutory distinction between contracts generally and employment non-competition agreements, the court relied on the *synthesis* of the rule of reason and the heightened requirements of Section 4a applied in *St Clair*. (COA Op 6, App 359a (quoting *St Clair*, 270 Mich App at 266).) This analysis may be appropriate to analyze the reasonableness of an employment non-compete. But it cannot be applied in reverse to define the rule of reason as applied to non-compete agreements among sophisticated commercial parties. [5]

As explained in the previous section, non-competition provisions in commercial contracts must meet the standard established in *Hubbard*. This analysis must be done with a view to the entire context surrounding the agreement and not just the text of the agreement itself. *Hubbard*, 27 Mich at 19.

By focusing on the wrong legal standard for evaluating a commercial non-compete, the Court of Appeals did not address the context in which the Termination Agreement arose. Instead, the court identified the various limitations imposed on Liquid's ability to bottle competitors' products and concluded that the parties' agreement was unreasonable. The effect of the Court of Appeals' decision is contrary to MARA's purpose of promoting competition. Innovation Ventures was apparently required to prevent *any* competitive use of its production equipment or allow *all* competitive use. The rule of reason is not so limited.

[5] Even if the *St Clair* synthesis was applicable to the present scenario, nothing in that case nor in MCL 445.774a would require the court to ignore the undisputed facts and circumstances existing at the time the parties entered into their agreement in determining whether the agreement protects a party's "reasonable competitive business interests." Doing so promotes form over substance in a manner inconsistent with the public's interest in competition intended to be protected.

Throughout the case, Defendants have quoted an excerpt from Innovation Ventures' interrogatory responses to suggest that the partial exclusivity provision in the Termination Agreement is solely intended to restrain competition. (Defs' Ans to Appl'n for Leave to Appeal 11; COA Op 7, App 360a.) Just as consistently, Defendants ignore prefatory language within that response, explaining that the parties agreed to the partial exclusivity provision "to protect Plaintiff's goodwill and to prevent Liquid Manufacturing from trading on its prior relationship with Plaintiff, including confidential information it had learned from Plaintiff. Plaintiff was interested in providing Liquid Manufacturing with the ability to bottle energy drinks on a limited basis consistent with Plaintiff's interest in protecting its goodwill and confidential information." (Defs' Ans to Appl'n for Leave to Appeal, Ex 3, Pl's Fourth Supp Resp to Interrog 31.) The omitted language provides the context necessary under the rule of reason to evaluate the reasonableness of the partial exclusivity provision at its inception. And the omitted language demonstrates that Innovation Ventures was seeking something other than preventing competition, which it could have more easily accomplished by simply denying Liquid permission to use Innovation Ventures' specialized production equipment in the first place.

Accordingly, the Court of Appeals' analysis of the enforceability of the Termination Agreement should be rejected.

C. Liquid violated the partial exclusivity provision in the Termination Agreement by producing unapproved competing products beginning two months later.

There is no factual dispute that Liquid violated the partial exclusivity provision in the Termination Agreement. Liquid has admitted that it produced Quick Energy starting in August 2010, Empower 9 Hour in September 2010, and E6 in December 2010. (Liquid's Ans to Reqs for Admissions 10-19, App 259a-270a.) In other words, within two months of agreeing to obtain

Innovation Ventures' approval before using Innovation Ventures' equipment to bottle competing products, Liquid breached the agreement. Liquid further violated the Termination Agreement by obtaining Innovation Ventures' conditional approval to bottle Eternal Energy by claiming it was being produced by a group of tattoo parlors when Liquid knew that the majority backers of Eternal Energy were Krause and Paisley. (Contra COA Op 7, App 360a.) And Liquid violated the Termination Agreement by producing LXR Biotech's other energy shot, Perfectly Petite. There being no genuine issue of material fact with regard to production of Quick Energy, Empower 9 Hour, E6, and Perfectly Petite, the Court should remand for entry of partial summary disposition in favor of Innovation Ventures on Liquid's violation of the Termination Agreement.

III. The Court of Appeals created an unworkable rule when it required that a party specifically identify misappropriated trade secrets and confidential information without full and complete discovery.

The judgment in this case was entered before discovery closed, before Defendants produced meaningful written discovery, and before any depositions were taken. Indeed, discovery was stayed to allow Defendants to move for summary disposition on their contract claims, but the trial court granted summary disposition on all claims. Nonetheless, the Court of Appeals criticized Innovation Ventures for being unable to identify the specific trade secrets and confidential information that Defendants had misappropriated. (COA Op 13, App 366a.) However, in misappropriation of trade secrets cases, it is frequently impossible for a plaintiff to be able to identify the specific confidential information and trade secrets that were actually misappropriated until *after* discovery is completed. And given that Krause and Paisley went into the very same business as Innovation Ventures, the doctrine of inevitable disclosure should ameliorate the burden to identify the specific trade secrets that they misappropriated.

"Generally, a circuit court should not grant summary disposition unless no fair likelihood exists that additional discovery would reveal more support for the nonmoving party's position." *Wurtz v Beecher Metro Dist*, 495 Mich 242, 258; 848 NW2d 121 (2014). Michigan "has a strong historical commitment to a far-reaching, open, and effective discovery practice." *Dorris v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 36; 594 NW2d 455 (1999). The fact that discovery remains open does not automatically mean that the decision to grant summary disposition is premature. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). Instead, a plaintiff arguing that additional time for discovery is necessary must "articulate the support she had for her allegations regarding a factual dispute." *VanVorous v Burmeister*, 262 Mich App 467, 478; 687 NW2d 132 (2004).

This case is in a strange procedural posture. Summary disposition was granted before discovery was completed and without Defendants having even raised in their second summary disposition motion a legal argument supporting dismissal of Innovations Ventures' trade-secret misappropriation claim.

Discovery had been truncated by several lengthy stays imposed by the circuit court. As the Court of Appeals noted, the circuit court even stayed discovery to prevent Innovation Ventures from conducting discovery against third parties and to allow Defendants to move for summary disposition. (COA Op 4, App 357a.) Despite the complexity of the issues in this case, the parties' lengthy relationship, and the undoubted communications among Paisley, Liquid, Krause, and Eternal Energy, no discovery regarding those subjects ever occurred despite several pending sets of discovery requests to Defendants. And no depositions were taken.

Nonetheless, the circuit court granted summary disposition to Defendants not only on the contract claims for which they had actually sought summary disposition, but on all of Innovation

Ventures' non-contract claims. (3/15/2013 Op & Order 28-37, App 344a-353a.) The circuit court *sua sponte* reached the remaining claims and concluded no genuine issues of material fact existed. (*Id.*) This result is especially anomalous given that a few months before, the circuit court had concluded that summary disposition on those very counts was *not* appropriate due to questions of material fact.[6] (6/15/2012 Op & Order 5, App 155a.)

In its briefing to the Court of Appeals, Innovation Ventures identified no fewer than 20 issues on which discovery was needed. (Appellant's COA Br 13-15.) The court nonetheless concluded that additional discovery was not necessary because Innovation Ventures did not "provide any independent factual evidence that a factual dispute exists." (COA Op 17, App 370a.) The court erred because Innovation Ventures *did* present evidence from which it was reasonable to conclude a factual dispute exists, and because the very nature of a case involving claims that a party misappropriated trade secrets makes unworkable imposing such a burden before meaningful discovery.

Throughout this case, Innovation Ventures has repeatedly identified the fact that Krause and Eternal Energy were able to near instantly move from marketing their energy-shot drink at five tattoo parlors to a $40 million contract with Wal-Mart. That kind of market move simply does not happen absent use of the type of confidential and trade secret information that Innovation Ventures made available to Defendants pursuant to the parties' contracts. (See 2d Am Verified Compl ¶¶ 7, 85-87, App 16a-17a, 34a.) There is a genuine dispute between the parties regarding whether Krause obtained any confidential or trade secret information while working with Innovation Ventures. (Krause Aff ¶ 4, App 8a-9a; Dolmage Aff ¶¶ 12, 20-21, App

[6] Innovation Ventures thus did not even have the opportunity before summary disposition was granted to argue that additional discovery was necessary as to the non-contract claims and submit affidavits demonstrating the additional facts and/or factual disputes that would have been elucidated by additional discovery.

237a-238a, 240a-241a; Henderson Aff ¶¶ 8-12, 15-16, App 225a-229a.) There is no dispute that Krause, K&L Development, Liquid, and Paisley had access to significant confidential information regarding Innovation Ventures' suppliers, marketing, ingredients, costs, production techniques, manufacturing process, formulas, and packaging. (Dolmage Aff ¶¶ 11-12, App 237a-238a; Henderson Aff ¶¶ 9-12, App 225a-228a.) There is also no dispute that Defendants were unfamiliar with the energy shot market before working with Innovation Ventures. (Henderson Aff ¶ 8, App 225a; see Krause Aff ¶ 6, App 9a.) Consequently, the very fact that after their relationship with Innovation Ventures ended, Defendants started a competing business and had immediate success is sufficient to demonstrate that there was a fair likelihood that additional discovery would reveal more support for Innovation Ventures' position.

Moreover, the very nature of this dispute—whether a party misappropriated another party's trade secrets—almost always involves calculated efforts to conceal the relevant conduct from the plaintiff. Very few cases involving the use of confidential information and the misappropriation of trade secrets arise where the defendants openly identify what they have done. Instead, the reality is that this sort of conduct occurs in secret, usually with deliberate efforts by the defendant to prevent the plaintiff from learning what has occurred. See *Kubik, Inc v Hull*, 56 Mich App 335, 340; 224 NW2d 80 (1974) (noting that documents and testimony showed efforts by defendants to conceal their efforts to misappropriate plaintiffs' trade secrets); *Dana Ltd v Am Axle & Mfg Holdings, Inc*, 2012 WL 2524008, at *11 (WD Mich, June 29, 2012) (weighing defendant's "surreptitious" activity and participation in projects done for new employer that "paralleled" projects done for plaintiff). Discovery is needed to identify what has occurred, especially the production of emails and depositions of the appropriate parties. The

Court of Appeals' expectation of additional independent evidence of Defendants' misappropriation of Innovation Ventures' confidential information and trade secrets is unworkable.

For this additional reason, the Court should reverse the Court of Appeals' decision and remand this case for additional proceedings in the circuit court.

CONCLUSION AND REQUESTED RELIEF

For all the foregoing reasons, Innovation Ventures respectfully requests that the Court should hold the following:

(1) that the EMI and Nondisclosure Agreement are not unenforceable for failure of consideration;

(2) that the partial exclusivity provision in the Termination Agreement is enforceable;

(3) that Liquid Manufacturing breached the partial exclusivity provision by producing unapproved energy shots; and

(4) that summary disposition was improperly entered on Innovation Ventures' trade-secret claims.

The Court should reverse the lower courts' decisions, order the entry of partial summary disposition in favor of Innovation Ventures on its claim that Liquid breached the partial exclusivity provision, and remand to the circuit court for further proceedings consistent with the Court's judgment.

Respectfully submitted,

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WARNER NORCROSS & JUDD LLP

By */s/ Matthew T. Nelson*

John J. Bursch (P57679)
Matthew T. Nelson (P64768)
900 Fifth Third Center
111 Lyon Street, N.W.
Grand Rapids, Michigan 49503-2487

Attorneys for Appellant Innovation Ventures, LLC